Supreme Court, U.S.
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No. 10-959

In The
Supreme Court of the United States

STEPHEN ANDREW CARDEN,

Petitioner,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following question is presented by the petitioner.

I. Did the Court err in finding that the Magistrate Judge found no reversible error in the ALJ's underlining decision where the ALJ wrongly found that the trust provided that the assets were to pass to Stephen A. Carden's estate when in fact they were to pass to his heirs-at-law and failed to recognize the Court's decision in *Gavitt v. Swiger* footnote number three regarding the settler-sole beneficiary's ability to revoke the trust?

II. Does the requirement that the trust be irrevocable discriminate against minors?

PARTIES BELOW

Petitioner Stephen A. Carden was the plaintiff-appellant in an appeal in the court below. Respondent Michael J. Astrue, Commissioner of Social Secuirty, was defendant-appellee in an appeal in the court below.

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PETITION FOR WRIT OF CERTIORARI

Stephen A. Carden, by counsel, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, filed on October 22, 2010. There was no good-faith determination of the law in petitioner's consolidated cases in either the district court or in the Fourth Circuit Court of Appeals.

OPINIONS BELOW

There are no published opinions below. All pertinent decisions appear in the Appendix.

This case involves upholding the decision of the ALJ where he found that the trust was revocable and therefore an asset of Stephen A. Carden.

JURISDICTIONAL STATEMENT

The Court of Appeals' final judgment was entered on October 22, 2010. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article One Section Eight of the United States Constitution.

STATUTORY PROVISIONS INVOLVED

This case involves 42 USc 1396 p et seq.

STATEMENT OF THE CASE

I. The Court erred in finding that the Magistrate Judge found no reversible error in the ALJ's underlining decision where the ALJ wrongly found that the trust provided that the assets were to pass to Stephen A. Carden's estate when in fact they were to pass to his heirs-at-law and failed to recognize the Court's decision in *Gavitt v. Swiger* footnote number three regarding the settler-sole beneficiary's ability to revoke the trust.

In the instant case Stephen A. Carden was injured in a car accident and received a settlement, at the time Stephen A. Carden was a minor. The Court was under a duty to protect those assets until Stephen reached the age of majority. His legal guardian petitioned the Court to create a trust for Stephen which would allow him to keep his SSDI payment. Upon Stephen's death the State was to be repaid any medical benefits it paid for Stephen during his lifetime. The balance of the trust was to be paid to Stephen's heirs-at-law, because Stephen was a minor and could not have made a will.

In *Gavitt v. Swiger* 162 W.Va. 238, 248 S.E.2d 849 (WV 1978) the assets of the trust were left to the settler-sole beneficiary's estate at his death. The Court noted in footnote three "since the trust instrument was executed in 1968 prior to the enactment of WV Code

36-1-14 a, which abolished the Doctrine of Worthier Title, we need not consider the impact of this statue on the right of the settler-sole beneficiary to revoke, particularly since the trust did not leave the corpus to his heirs at his death." Id at 243, 851. Clearly the Court in *Gavitt* saw the distinction between leaving the corpus to his estate versus leaving his corpus to his heirs-at-law. In *Gavitt* the settler-sole beneficiary left his corpus to his estate. Therefore, the only person who could determine who was to receive his estate was the settler-sole beneficiary. In the instant case the trust corpus was left to Stephen Carden's heirs-at-law which at any point in time could be determined statutorily and therefore his heirs-at-law were contingent beneficiaries and thus Stephen Carden was not the sole beneficiary of the estate.

The ALJ based the irrevocability of the trust solely on *Gavitt v. Swiger*, and found that Stephen A. Carden left the assets to his estate (Appendix 1), which he did not. He left the assets to his heirs-at-law (Appendix 6). Clearly this was an abuse of discretion which quite possibly explains why the ALJ failed to discuss footnote three and its impact on this case.

The fact that the ALJ failed to address footnote three and its impact on the instant case, and the Court's finding that Stephen Carden left the assets to his estate constitutes reversible error on the part of the Magistrate Judge since she relied on the ALJ's finding of revocability without comment.

The reason that the regulations call for an irrevocable trust is to ensure that the Medicaid agency is repaid the medical benefits it provides to the beneficiary during his lifetime. Even though the trust in this case may have been revocable, it required a hearing before a judge to ratify the revocability which at the same time protects that Medicaid agency since the trustee is required upon termination of the trust to repay the Medicaid agency what it is owed.

In West Virginia had the Applicant applied to the Court to revoke the trust, notice would have been sent to the contingent beneficiaries, namely his heirs-at-law, and in fact a Guardian Ad Litem would be named to represent the unborn heirs-at-law even if the Court found the trust to be revocable, the trustee would be required to pay back Medicaid what is owed to them. Thus, the safeguards for payback to the Medicaid agency is upheld which is the sole purpose for finding that the trust be irrevocable.

II. The requirement that the trust be irrevocable discriminate against minors.

In the instant case, Stephen Carden was a minor when the trust was made. He was not able to make a will. According to law the Court had no authority but to leave the assets to Stephen Carden's heirs-at-law, as those were the only individuals who could receive the estate by intestate succession. Therefore, any minor would have been under that same restriction. Under the decision of the ALJ, no minor could ever have a

trust which complied with the irrevocable requirement, despite the fact that all safe guards were in place to protect Medicaid, which was the reason that the regulations require irrevocability of the trust.

REASONS FOR GRANTING THE WRIT

The Writ must be granted because the Fourth Circuit Court of Appeals' decision clearly and unambiguously misinterpreted the facts of the case and because the decision is discriminatory to minors

Dated: January 20, 2011

Respectfully submitted,

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APPENDIX 1

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF
CLAIM FOR

Stephen A. Carden
Supplemental Security Income

(Claimant)

_____ _____
_____ 236-23-_____
(Wage Earner)
(Social Security Number)

This case is before the Administrative Law Judge pursuant to remand by the United States District Court for the Southern District of West Virginia.

JURISDICTION AND PROCEDURAL HISTORY

The claimant protectively filed an application for supplemental security income on June 23, 2000 (Exhibit 25). The application was denied at the initial level because the claimant was considered to have resources in excess of $2000 (Exhibit 26). The initial-level determination was affirmed upon reconsideration (Exhibit 28), and the claimant made

a timely request for hearing before an Administrative Law Judge (Exhibit 29). After a hearing before the undersigned, at which the claimant appeared and testified, represented by an attorney, Leigh B. Anderson, the undersigned issued a decision on May 23, 2002, finding that the claimant was not eligible for supplemental security income due to resources and income in excess of the amounts permitted under title XVI-namely, the Stephen A. Carden Trust and an annuity payable to the trust (Exhibit B I A).

The Appeals Council denied the claimant's request to review the Administrative Law Judge decision, which became the final decision of the Commissioner of Social Security (Exhibit B2A). The claimant appealed to the United States District Court for the Southern District of West Virginia. The Federal District Court remanded the case to the Commissioner for further proceedings in accordance with the fourth sentence of section 205(g) of the Social Security Act. The Appeals Council vacated the prior decision and remanded the case to an Administrative Law Judge for further proceedings consistent with the decision of the Federal District Court (Exhibit B5A).

A supplemental hearing was held before the undersigned Administrative Law Judge on June 15, 2005, in Beckley, West Virginia. The claimant appeared and testified. The claimant was represented by Greg R. Lord, an attorney. Mr. Lord represented the

claimant in his appeal to the Federal District Court.

ISSUES

No retroactive benefits are payable under title XVI of the Social Security Act. Therefore, this decision adjudicates the claimant's eligibility for supplemental security income beginning with the protected date of filing.

The general issue is whether the claimant is eligible for supplemental security income. The specific issue is whether the claimant has resources and/or income in excess of the amounts permitted under title XVI of the Social Security Act. The issue of whether the claimant has been under a "disability" as defined in the Social Security Act since the protected date of filing was not determined at the initial or reconsideration levels and is not determined by this decision.

Section 1611(a)(1)(B) of the Social Security Act provides that an eligible individual is an aged, blind, or disabled individual who, if not living with a spouse, has resources other than resources excludable under section 1613(a) of not more than $2000.00.

Section 1611(a)(1)(A) of the Social Security Act provides, in part, that an eligible individual is an aged, blind, or disabled individual who does not have an eligible spouse and whose income, other than income excluded pursuant to Section 1612(b), is at the rate of not more than $520 in 2000, $530 in January through July 2001, $531 in August through December 2001, $545 in 2002, $552 in 2003 $564 in

2004, and $579 in 2005. Section 1612(a) of Act states that "income" means both earned and unearned income.

EVALUATION OF THE EVIDENCE

Pursuant to a suit for personal injury damages, the claimant, Stephen Andrew Carden (known as Andrew Carden) received a settlement, approved by Order of the Circuit Court of Nicholas County, West Virginia, on August 19, 1994. The settlement was a structured settlement providing for periodic payments (via purchase of an annuity) for the life of Andrew Carden and the funding of a trust, the Stephen Andrew Carden Trust (Trust).

The Stephen Andrew Carden Trust

The Trust was designed to be a supplemental needs trust (Memorandum, Exhibit 38, p. 3). By the terms of the Trust Agreement (Exhibit 38, pp. 9-26), it was the "secondary intention" of the Circuit Court of Nicholas County and the parties to the settlement "to provide fora continuing conservation and enhancement of the funds provided in the settlements to supplement all other financial and service benefits to which Andrew might be eligible as a result of his disability from any local, county, state, or federal agency or through any public or private profit or non-profit corporations or agencies" (Recitals 4). The trust is "explicitly a supplemental and discretionary trust" (Recitals 5) The assets of the trust are "not available to the claimant

except as provided in this Agreement" (Recitals 7). The Trust Advisory Committee has the "sole and absolute discretion to distribute income and principal to Andrew or for Andrew's benefit" (Art. III, 3.1). The remainder of the trust at the claimant's death is subject to the claimant's testamentary devise or, in default of the claimant's exercise of this right, is to be distributed in accordance with the laws of intestate succession of the state of the claimant's residence at the time of his death (Art. IV, 4.2 B). The Trust was "established as an irrevocable trust" (Recitals 6).

The regulations define resources as cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance. If the individual has the right, authority, or power to liquidate the property, or his or her share of the property, the property is considered to be a resource. If a property right cannot be liquidated, the property will not be considered to be a resource of the individual (or spouse). (20 CFR § 416.1201)

The claimant, who was born on February 12, 1978, was an adult on the protected date of filing. The claimant is a quadriplegic from the shoulders down. However, there is no evidence or indication that the claimant was legally incompetent at any time relevant to the decision.

Most states follow the general principle of trust law that

if a grantor (settlor) is also the sole beneficiary of a trust, the trust is revocable even if the language of the trust states that the trust is irrevocable (Restatement (Second) of Trusts § 339 (1959); Program Operations Manual (POMS) SI 01120.200(D)(3)). West Virginia follows the majority rule (Gavitt v. Swiger, 248 S.E. 849, 851 (W. Va. 1978) (recognizing that a settlor-sole beneficiary can revoke a trust despite language of irrevocability in the trust instrument); United States v. Ritter, 416 F. Supp. 777, 784 (S.D.W. Va. 1976) rev'd on other grounds, 558 F.2d 1165 (4th Cir. 1977) (holding that the settlor-sole beneficiary exception is the law of West Virginia)).

Despite recitals in the Trust Agreement to the effect that the assets of the settlement placed in the Trust "should not be deemed to have ever been... available to Andrew" (Recitals 6), the Social Security Administration deems the claimant to be the true settlor since he is the source of the settlement funds (POMS SI 01120.200(B)(2)). The undersigned made this finding in the prior decision of May 23, 2002, and the finding was not in dispute before the Federal District Court (Exhibit B4A, p. 8).

The Federal District Court remanded the case because the Administrative Law Judge did not consider whether West Virginia law recognizes the irrevocability of a grantor trust if there is a named "residual beneficiary" such as a governmental entity (Exhibit B4A, p. 12). Article IV, Section 4.2 A of the Trust Agreement states, "Upon Andrew's death, any

principal and interest remaining in the Trust shall be paid to any governmental agency which may have a legal claim to said principal" (Exhibit 38, p. 15). The undersigned finds that in this case the State of West Virginia is a creditor, not a "residual beneficiary."

A State is generally not considered to be a residual or contingent beneficiary, but a creditor, and the reimbursement is payment of a debt (POMS SI 01120.200(H)(1)(b)). Although there are exceptions to this general rule in some states (POMS SI NY01120.200; POMS SI

DALOI 120.200), there is no West Virginia statute or case law indicating that the State should be considered a residual beneficiary rather than a creditor.

A person is a beneficiary of a trust if the settlor manifests an intention to give the person a beneficial interest (Restatement (Third) of Trusts § 48 (2003)). The Restatement of Trusts distinguishes a beneficiary of a trust, or one whom the settlor manifests an intention to give a beneficial interest, from one who merely benefits incidentally from the performance of a trust and is not a beneficiary (Restatement (Third) of Trusts § 48 (2003)). The Comment for the Restatement states that individuals who benefit incidentally "may have other rights, for example, as creditors," and provides the following example: S leaves the S Proprietorship and other assets to T in Trust for L for Life remainder to R or R's issues, authorizing T to continue the business and to pay from the trust property any debts that T may properly incur in the

operation of the business. T subsequently incurs several debts. The creditors are not beneficiaries, of the Trust (Id. at Comment(a), Illustration(2)). Under Article IV, section 4.2(A) of the Trust Agreement, the State only benefits incidentally from the Trust. Specifically, the State only benefits from the Trust if Carden incurs debt by receiving Medicaid from the State. If Andrew Carden never receives Medicaid from the State, the State does not have a claim against the Trust. Moreover, while the State may have a claim for reimbursement of the amount that it has paid in medical benefits, it does not have the right to more than its payments, nor to the residue.

Since the State is not a beneficiary of the Trust, we conclude that Carden is the settlor and sole beneficiary of the Trust. Accordingly, the Trust is revocable and should be considered a resource for purposes of determining SSI eligibility.

As of the protected date of filing of the claimant's application for supplemental security income, in June 2000, the Trust contained cash, stock, and equities valued at over $44,500 (Exhibit 33). The value of the Trust is currently somewhat less than $50,000. The value of the Trust as a resource precludes the claimant's eligibility for supplemental security income.

Annuity

The Circuit Court of Nicholas County ordered that a portion of the settlement be used to purchase an

annuity. SAFECO Assigned Benefits Service Company (SAFECO) was named the owner of the annuity and, pursuant to the terms of the policy, makes monthly payments to the Trust (See SAFECO Life Insurance Company Corporate Guarantee, Exhibit B2D)). The terms of the annuity agreement provide that none of the periodic payments may be "accelerated, deferred, increased or decreased and may not be anticipated, sold, assigned, or encumbered" (Uniform Qualified Assignment and Release, Exhibit B2D). Further, a representative of SAFECO indicated in a letter dated June 8, 2000, that none of the periodic payments may be "altered, accelerated, deferred, increased or decreased and may not be anticipated, sold, assigned, or encumbered" (Exhibit 32). Therefore, because the annuity payments are made to the Trust and may not be altered, accelerated, deferred, increased or decreased and may not be anticipated, sold, assigned, or encumbered, the payments to the Trust have been irrevocably assigned to the

Trust (Johnson v. Guhl, 91 F.Supp.2d 754, 764 (D. N.J. 1990) (stating that most annuities are irrevocable); Allstate Insurance Co. v. American Bankers Ins. Co. of Florida, 882 F.2d 856, 85960 (4th Cir. 1989) (indicating that an individual "may not sell, assign, or hypothecate" an annuity that he does not own)).

An annuity that is assigned to a trust is not income if the assignment is irrevocable (POMS SI 01120.200(G)(1)(d)). If the Trust were irrevocable, the annuity payments would not be considered

income. However, since the Trust is revocable, the annuity payments made to the Trust should be considered income in the month they are received and, if retained into the next month, a resource (POMS SI 01120.200(D)(1)). The amount of the monthly annuity payment precludes the claimant's eligibility for supplemental security income.

Other Income

The claimant testified that he has never received any cash payment from the Trust. The home in which the claimant resides is an asset of the trust, purchased prior to June 2000 (Exhibit 12). The claimant reported that items such as a motor vehicle and computer that are specially equipped to accommodate his physical disability have been purchased for him by the Trust Advisory
Committee. However, Mr. Lord acknowledged that some undetermined amounts of money have been spent on food and clothing due to the claimant's need. Trust funds were used to purchase a mower equipped for the claimant's use, which would appear to be a household operating expense rather than a capital improvement (SI 00120.200F) Therefore, there is evidence that, even if the Trust were not a resource, there have been distributions from the Trust which would qualify as income.

FINDINGS

After careful consideration of the evidence of record, the undersigned makes the following findings:

1. The Stephen A. Carden Trust is not an excludable resource.

2. The annuity owned by SAFECO Assigned Benefits Service Co., purchased pursuant to the settlement agreement approved by the Circuit Court of Nicholas County, is not an excludable resource.

3. The Claimant has countable resources of $2000 or more.

4. The Claimant has had unearned income of $1600 per month.

5. The Claimant's countable income has exceeded the allowable amount since June 2000.

DECISION

It is the decision of the Administrative Law Judge that the amount of the claimant's resources precludes his eligibility for supplemental security income.

It is further the decision of the Administrative Law Judge that the amount of the claimant's countable income renders him ineligible for supplemental security income for the period June 2000 to date.

Harry C. Taylor, II

U.S. Administrative Law Judge

12/27/05

Date

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

STEPHEN A. CARDEN,

Plaintiff,

V.
CASE NO. 2:07-cv-00025

MICHAEL J. ASTRUE,
Commissioner of Social Security',

Defendant.

MEMORANDUM OPINION

This is an action by Plaintiff, Stephen A. Carden (hereinafter "Claimant") seeking review of the decision of the Commissioner of Social Security

denying Claimant's application for Supplemental Security Income ("SSI") , under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f. Both parties have consented in writing to a decision by the United States Magistrate Judge, and have briefed the issues.

Factual History

The salient underlying facts are as follows:

> In May of 1994, Claimant received severe and permanent injuries to his spinal cord in an automobile accident. Claimant is a quadriplegic. (Tr. at 42.) A civil action ensued, and the parties involved in the accident reached a settlement.

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1 On February 12, 2007, Michael *J.* Astrue became the Commissioner of Social Security. Under Fed. R. Civ. P. 25(d)(1) and 42 U.S.C. § 405(g), Michael J. Astrue is automatically substituted as the defendant in this action.

(Tr. at 259.) The Circuit Court of Nicholas County established and approved.

the "Andrew Carden Trust, Trust Agreement Consistent with Order of the Nicholas County Circuit Court, West Virginia" ("Trust") dated August 19, 1994. (Tr. at 267-84.) The Trust received a payment in the amount of

$643,812.41. (Tr. at 294.) The principal purpose of the Trust is to "provide a system for fund handling, fiscal management, investment and disbursement for Andrew."

(Tr. at 268.) In addition, "[i]t is the secondary intention of the Court and the parties hereto to provide for a continuing conservation and enhancement of the funds provided in the settlements to supplement all other financial and service benefits to which Andrew might be eligible as a result of his disability from any local, county, state or federal agency (Tr. at 268.) The Trust provides that it is "an irrevocable trust ... and the assets directed to this Trust by the Court should not be deemed to have been or to be available to Andrew." (Tr. at 269.)

The terms of the Trust provide that upon Claimant's death, any principal and interest remaining in the Trust "shall be paid to any governmental agency which may have a legal claim to said principal." (Tr. at 273, Section 4.2 A.) The Trust further provides that upon Claimant's death, "any assets remaining in the Trust estate after distribution under Section 4.2 A. above, shall be paid over, delivered and conveyed to Andrew's estate and distributed in accordance with his Last Will and Testament or, if none, then to his heirs, determined at the time of his death in accordance with the intestate succession laws of the state of his residence at his death ..... (Tr. at 273, Section 4.2

B.) At the time of the settlement, the Circuit Court of Nicholas County also ordered that an annuity be purchased so that monthly payments would be made to the Trust for the life of Claimant. (Tr. at 286.) SAFECO Assigned Benefits Service Company is the owner of the annuity. (Tr. at 286, 292.) Payments are made by the annuity company to the Trust and may not be "altered, accelerated, deferred, increased, or decreased, nor may they be sold, encumbered, mortgaged, or anticipated in whole or in part by assignment or otherwise." (Tr. at 293.)

(Tr. at 339-41.)

Procedural History

Claimant protectively filed an application for SSI on June 23,2000, alleging disability as of May 29, 1994, due to a spinal cord injury. (Tr. at 48, 204-07.) The claim was denied initially and upon reconsideration on the grounds that Claimant had resources worth more than $2,000. (Tr. at 208-22, 224-26.) On July 20, 2001,Claimant requested a hearing before an Administrative Law Judge ("ALJ"). (Tr. at 227.) The hearing was held on November 2, 2001,before the Honorable Harry C. Taylor II. (Tr. at 297-310.) By

decision dated May 23, 2002, the ALJ determined that Claimant was not entitled to benefits because he possesses trust assets, including annuity payments, which constitute resources in excess of $2,000. (Tr. at 14-17.) The ALJ's decision became the final decision of the Commissioner on June 14, 2003, when the Appeals Council denied Claimant's request for review. (Tr. at 5-7.) On August 18, 2003, Claimant instituted an action seeking judicial review of the administrative decision pursuant to 42 U.S.C. 405(g). (Tr. at 377.)

On August 24, 2004, the undersigned Magistrate Judge entered a Proposed Findings and Recommendation, proposing that the presiding District Judge find that the ALJ's decision was not adequately explained and, as a result, not supported by substantial evidence. (Tr. at 338-50.) The undersigned recommended that the presiding District Judge remand the matter for (1) consideration of the effect of the Trust provision which names a governmental agency as a residual beneficiary; (2) identification of evidence indicating that Claimant received cash paid

directly from the Trust or that Claimant received food, clothing, or shelter such that it qualified as income; and (3) explanation of the ALJ's finding that payments from the annuity are a resource. (Tr. at 347, 348-49.)) On September 20, 2004, the Honorable John T. Copenhaver, Jr., United States District Judge, adopted the proposed findings and remanded the case to the Commissioner for further proceedings. (Tr. at 334-37.)

On June 15, 2005, the ALJ held a hearing. (Tr. at 398-422.) On December 27, 2005, the ALJ issued a second decision, finding that the amounts of Claimant's resources and countable income rendered him ineligible for SSI. (Tr. at 323.) The ALJ's decision became the final decision of the Commissioner on November 8, 2006, when the Appeals Council declined to assume jurisdiction. (Tr. at 311-13). On January 12, 2007, Claimant brought the present action seeking judicial review of the administrative decision pursuant to 42 U.S.C. § 405(g).

Standard of Review

The sole issue before this court is whether the final decision of the Commissioner denying the claim is supported by substantial evidence. In Blalock v. Richardson, substantial evidence was defined as

> "evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is 'substantial evidence.'"

Blalock v. Richardson, 483 F.2d 773, 776 (4th Cir. 1972) (quoting Laws V. Cellebreze 368F.2d 640,642 (4th Cir.1966)).Additionally, the Commissioner. not the court, is charged withresolving conflicts in the evidence.Hays

v.Sullivan, 907 F.2d1453, 1456 (4th Cir. 1990). Nevertheless, the courts "must notabdicate their traditional functions; they cannot escape their duty to scrutinize the record as a whole to determine whether the conclusions reached are rational." Oppenheim v. Finch, 495 F.2d 396, 397 (4th Cir. 1974).

For the reasons set forth below, the court concludes that the decision of the Commissioner is supported by substantial evidence.

Analysis

Claimant challenges the ALJ's decision on the grounds that (1) the Trust is not Claimant's resource as it is irrevocable and meets the requirements of 42 U.S.C. § 1396p(d)(4)(A); and (2) the annuity payments are irrevocably assigned to the Trust and therefore are not Claimant's income. (Pl.'s Br. at 14-19.)

In response, the Commissioner argues that (1) 42 U.S.C. 1396p(d) (4) (A) does not apply to the Trust

because it was not established on or after January 1, 2000; (2) Claimant is both the settler and sole beneficiary of the Trust, and thus the ALJ properly found that the Trust is revocable and constitutes a resource for purposes of SSI; and (3) given that the Trust is revocable, the ALJ properly found that the annuity payments received into the Trust are income, and if retained into the next month, a resource. (Def.'s Br. at 5-11.)

The court dispenses at the outset with Claimant's reliance on 42 U.S.C. § 1396p(d)(4)(A). Although Section 1917(d)(4)(A) of the Social Security Act, 42 U.S.C. § 1396p(d)(4)(A), does set forth an exception to the general rule of counting trusts as resources and income for SSI eligibility purposes, the exception is effective only for trusts established on or after January 1, 2000. Program Operations Manual System ("POMS") SI 01120.201 (Feb. 2001); POMS SI 01120.203 (Aug. 2002).[2] As the Commissioner correctly argues, the exception does not apply to the

instant Trust because it wasestablished on August 19, 1994. (Tr. at 267.)

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[2] POMS provisions are found at https://secure.ssa.gov/apps10/poms.nsf. "The POMS guidelines represent the Commissioner's interpretation of the governing statutes and regulations, and so are entitled to some deference." Wilson v. Apfel, 81 F. Supp.2d 649, 653 (W.D. Va. 2000).

In his decision following remand, the ALJ found that the Trust and annuity are not excludable resources; Claimant had countable resources of $2,000 or more and unearned income of $1,600 per month; and Claimant's countable income had exceeded the allowable amount. (Tr. at 322.) Based on these findings, the ALJ decided that the amounts of Claimant's resources and countable income precluded his eligibility for SSI. (Tr. at 323.)

Resources are defined in the regulations as "cash or other liquid assets or any real or personal property that an individual owns and

could convert to cash to be used for his or her support and maintenance." 20 C.F.R. § 416.1201(a)(2005). Income is defined as "anything you receive in cash or in kind that you can use to meet your needs for food and shelter." 20 C.F.R. § 416.1102 (2005). Annuities are specifically identified in the regulations as a type of unearned income. 20 C.F.R. § 416.1121 (a)(2005).

In reaching his decision of ineligibility, the ALJ fulfilled the District Judge's direction for "an adequate explanation of the findings related to the analysis of claimant's Trust to determine whether it is a resource; development and analysis of facts regarding claimant's receipt of payments from the Trust which may constitute unearned income, and of payments received from the annuity; and as otherwise more fully set forth in the magistrate judge's proposed findings and recommendation." (Tr. at 337.) First, the ALJ considered and determined the effect of the Trust provision which states that upon Claimant's death,

"any principal and interest remaining in the Trust shall be paid to any governmental agency which may have a legal claim to said principal." (Tr. at 273, 320-21.) The ALJ relied upon provisions in the SSA's POMS and the Restatement (Third) of Trusts § 48 (2003) to find that "the State of West Virginia is a creditor, not a `residual beneficiary.'" (Tr. at 320-21.) The ALJ explained:

> A State is generally not considered to be a residual or contingent beneficiary, but a creditor, and the reimbursement is payment of a debt (POMS SI 01120.200(H) (1) (b) Although there are exceptions to this general rule in some states (POMS SI NY01120.200; POMS SI DAL01120.200), there is no West Virginia statute or case law indicating that the State should be considered a residual beneficiary rather than a creditor.

A person is a beneficiary of a trust if the settlor manifests an intention to give the person

a beneficial interest (Restatement (Third) of Trusts § 48 (2003)) . The Restatement of Trusts distinguishes a beneficiary of a trust, or one whom the settlor manifests an intention to give a beneficial interest, from one who merely benefits incidentally from the performance of a trust and is not a beneficiary (Restatement (Third) of Trusts § 48 (2003)). The Comment for the Restatement states that individuals who benefit incidentally "may have other rights, for example, as creditors," and provides the following example: S leaves the S Proprietorship and other assets to T in Trust for L for Life remainder to R or R's issues, authorizing T to continue the business and to pay from the trust property any debts that T may properly incur in the operation of the business. T
subsequently incurs several debts. The creditors are not beneficiaries of the Trust. (Id. at Comment(a), Illustration(2)). Under Article IV, section 4.2(A) of the Trust Agreement, the State only benefits incidentally from the Trust. Specifically, the State only benefits from the Trust if [Claimant] incurs debt by receiving Medicaid from the State. If [Claimant] never receives Medicaid from the State, the State does not have a claim

against the Trust. Moreover, while the State may have a claim for reimbursement of the amount that it has paid in medical benefits, it does not have the right to more than its payments, nor to the residue.

(Tr. at 321.) Having determined that the State is not a beneficiary of the Trust, the ALJ concluded that Claimant was "the settlor and sole beneficiary of the Trust," and accordingly that "the Trust is revocable and should be considered a resource for purposes of determining SSI eligibility." Id.

With respect to Claimant's receipt of payments from the Trust which may constitute unearned income, the ALJ developed the record through questioning at the June 2005 hearing and furnished this factual analysis in the decision:

The claimant testified that he has never received any cash payment from the Trust. The home in which the claimant resides is an asset of the trust, purchased prior to June 2000 (Exhibit 12). The claimant reported that items such as a motor vehicle and computer that are specially equipped to accommodate his physical disability have been purchased for him by the Trust Advisory Committee. However,

[Claimant's attorney] acknowledged that some undetermined amounts of money have been spent on food and clothing due to the claimant's need. Trust funds were used to purchase a mower equipped for the claimant's use, which would appear to be a household operating expense rather than a capital improvement (SI 00120.200F). Therefore, there is evidence that, even if the Trust were not a resource, there have been distributions from the Trust which would qualify as income.

(Tr. at 322.)

Finally, regarding payments received from the annuity, the ALJ developed the record at the June 2005 hearing and found that "since the Trust is revocable, the annuity payments made to the Trust should be considered income in the month they are received and, if retained into the next month, a resource. (POMS SI 01120.200(D)(1)). The amount of the monthly annuity payment [$1,600]precludes the claimant's eligibility for ... SSI." (Tr. at 322,414.)

The court finds that the development of the evidence and explanation of findings which occurred on the record after remand effectively

filled the gaps which previously prevented a finding that the decision denying benefits was supported by substantial evidence. The court further finds that the ALJ's decision adheres to the applicable regulations and case law.

After a careful consideration of the entire record, the court finds that the Commissioner's decision is supported by substantial evidence. Accordingly, by Judgment Order entered this day, the final decision of the Commissioner is AFFIRMED, and this matter is DISMISSED from the docket of this court

The Clerk of this court is directed to transmit copies of this Memorandum Opinion to all counsel of record.

ENTER: March 28, 2008

Mary E. Stanley

United States Magistrate Judge

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

STEPHEN A. CARDEN,

Plaintiff,

V. **C A S E**
NO. 2:07-cv-00025

MICHAEL J. ASTRUE,

Commissioner of Social Security',

Defendant.

J U D G M E N T O R D E R

In accordance with the MEMORANDUM OPINION entered this day, it is hereby

ORDERED as follows:

I. The final decision of the Commissioner is AFFIRMED; and

II.This action is DISMISSED from the docket of this court. The Clerk is directed to transmit copies of this Order to all counsel of record.

ENTER: March 28, 2008

Mary E. Stanley

1 On February 12, 2007, Michael *J.* Astrue became the Commissioner of Social Security. Under Fed. R. Civ. P. 25(d)(1) and 42 U.S.C. § 405(g), Michael J. Astrue is automatically substituted as the defendant in this action.

APPENDIX 4

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1795

STEPHEN ANDREW CARDEN,

Plaintiff - Appellant,

V.

MICHAEL J. ASTRUE, Commissioner of Social Security,

Defendant - Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Mary E. Stanley, Magistrate Judge. (2:07-cv-00025)

Submitted: September 23, 2010

Decided: October 22, 2010

Before MOTZ, DUNCAN, and KEENAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Greg R. Lord, THE LORD LAW FIRM,

PLLC, Charleston, West Virginia, for Appellant. Eric P. Kressman, Regional Chief Counsel, Edward C. Tompsett, Special Assistant United States Attorney, Nora Koch, Deputy Regional Chief Counsel, Philadelphia, Pennsylvania; Charles T. Miller, United States Attorney, Carol A. Casto, Assistant United States Attorney, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Stephen Andrew Carden appeals the magistrate judge's* order affirming the Commissioner's decision denying Carden's application for supplemental security income. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the magistrate judge.

Carden v. Astrue, No. 2:07-cv-00025 (S.D. W. Va. Mar. 28, 2008)

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

This case was decided by a magistrate judge with the parties' consent pursuant to 28 U.S.C. § 636(c) (2006).

APPENDIX 5

FILED: October 22, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1795
(2:07-cv-00025)

STEPHEN ANDREW CARDEN

Plaintiff - Appellant

v.

MICHAEL J. ASTRUE, Commissioner of Social Security

Defendant - Appellee

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/

PATRICIA S. CONNOR, CLERK

APPENDIX 6

ANDREW CARDEN TRUST

TRUST AGREEMENT

CONSISTENT WITH ORDER OF THE

NICHOLAS COUNTY CIRCUIT COURT,

WEST VIRGINIA

THIS TRUST AGREEMENT, dated the 19th day of August, 1994, (hereafter, the "Agreement"), is established as part of an agreement in a civil action filed and pending in the Nicholas County Circuit Court, West Virginia (hereafter the "Court"), styled as Gary Carden, guardian and next of friend of Stephen Andrew Carden, an infant v. Raymond Wesley Olson and Arthur Wesley Olson, Civil Action No. 94-P-97, and as specifically reviewed and approved by the Court in the aforementioned lawsuit and as directed by Court Order dated the 19th day of August, 1994, in said Case Number. The following persons have agreed to serve as the initial Trust Advisory Committee under

this Agreement: GARY A. CARDEN, one vote;

PAMELA CARDEN, one vote; and GREG TUCKER, one vote. HUNTINGTON NATIONAL BANK WEST VIRGINIA, Charleston, West Virginia has agreed to serve as Trustee under this Agreement. The duties, obligations and authority of the Trust Advisory Committee and the Trustee shall be as set forth below.

RECITALS

1. Pursuant to an order of the Court in the above-referenced civil action on August 19, 1994, the trust established pursuant to this Agreement (hereinafter the "Trust") shall receive a payment of .....

A.ARTICLE IV

TERM

4.1 Term, The term of this Trust shall continue indefinitely for the lifetime of Andrew. During the term trust is subject to the general terms and conditions contained in this Agreement and specifically subject to the provisions contained in this Article as to final distribution of the corpus and accumulated income.

4.2 Disposition upon Andrew's Death.

A. Upon Andrew's death, any principal and interest remaining in the Trust shall be paid to any governmental agency which may have a legal claim to said principal. If more than one governmental agency has a claim to the Trust Estate which in total exceeds the total of the Trust Estate, the Trustee is authorized to pay the entire Trust Estate into court and allow the governmental agencies to bring an action to collect such funds.

B. Upon Andrew's death, any assets remaining in the Trust estate after distribution under Section 4.2 A. above, shall be paid over, delivered

and conveyed to Andrew's estate and distributed in accordance with his Last Will and Testament or, if none, then to his heirs, determined at the time of his death in accordance with the intestate succession laws of the state of his residence at his death; provided, however, that should any such heir be under the age of twenty-one, such heir's share shall vest absolutely and indefeasibly in the heir, but may be paid over, delivered and conveyed to a suitable person (who may be the Trustee) as Custodian for the beneficiary under the Uniform Transfers to Minors Act (21). Subject to Section 4.2 (C) of this Article, after the Trustee has reimbursed itself and the Trust Advisory Committee for all fees and expenses, the Trustee shall then terminate the Trust and close the Trust estate.

C. Upon Andrew's death, any payments to be made to the Trust after Andrew's death which are not otherwise disposed of pursuant to the terms of either settlement agreement described in the recitals to this Agreement shall be assigned to Andrew's heirs,

determined in accordance with his Last Will and Testament, or, if none, as determined at the time of his death in accordance with the intestate succession laws of the state of his residence at the time of his death; provided, however, that should any such heir be under the age of twenty-one, such heir's share of such payment shall vest absolutely and indefeasibly in the heir, but may be paid over to a suitable person as Custodian for the beneficiary under the Uniform Transfers to Minors Act (21). If for any reason the Trustee should be unable to effect a proper assignment of such payments to Andrew's heirs without causing a partial or complete forfeiture of such payments, then this Trust shall not terminate upon Andrew's death, but shall continue for the sole purpose of receiving such payments and paying them over to Andrew's heirs. In that event, Andrew's heirs (determined at the time of Andrew's death) shall have the right to assign all of their right, title, and interest through either an inter vivos disposition or a testamentary disposition. Once the final payment is received by the Trust,.... ....